IN THE SUPREME COURT OF MISSOURI

L.A.C., a minor, by and through her Next Friend, Dina Cannon,	)	
Plaintiff-Appellant,	)	
v.	)	**No. SC 83718**
WARD PARKWAY SHOPPING CENTER COMPANY, L.P., W.S.C. ASSOCIATES, L.P., IPC INTER-NATIONAL CORPORATION, and G.G. MANAGEMENT COMPANY, INC.,	)	
Defendants-Respondents.	)	

On Transfer from the Missouri Court of Appeals, Western District
Case No. WD 58111
Spinden, C.J., and Ulrich and Smith, JJ

APPELLANT'S SUBSTITUTE REPLY BRIEF

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In their continued effort to blame the twelve-year-old victim in this case for her own rape, defendants have again filled their briefs with innuendos, half-truths, and outright false statements about the circumstances surrounding plaintiff's rape. They refer to the crime as "having sex," implying that plaintiff had consensual sex with her attacker. WPSCC Brief at 7. To support this insinuation they repeatedly claim that plaintiff's attacker was her "boyfriend." They also claim that plaintiff and her attacker "predetermined that they would meet at the mall on March 15, 1997," IPC Brief at 55, and suggest that plaintiff somehow provoked her rape by "making out" with her attacker before that rape occurred. Id. at 12. Finally, they imply that plaintiff was not disturbed by the attack, stating that she was "laughing and giggling" after the rape. Id. at 13. Every one of these statements is false, as the following facts show.

1. Fitzpatrick Was Tried And Convicted For Raping Plaintiff

The attack in question was not an "alleged rape," as claimed by defendants; it was a rape. Brandon Fitzpatrick was charged in the Circuit Court of Jackson County, Family Court Division, with having sexual intercourse with plaintiff, by the use of forcible compulsion, in violation of Section 566.030 R.S.Mo. (Rape – Class B Felony). An evidentiary hearing on this count was held before the Honorable Jay A. Daugherty. After hearing all of the evidence, including testimony from plaintiff, Alicia Griddine and Fitzpatrick himself, Judge Daugherty sustained the allegations and committed Fitzpatrick to the custody of the Juvenile Officer.

2. Fitzpatrick Was Not Plaintiff's "Boyfriend," Nor Did She Arrange To Meet Him At The Ward Parkway Mall On The Night He Raped Her

Before he raped her, plaintiff had only met Fitzpatrick on one other occasion – the previous Saturday when she was at the Ward Parkway Mall. L.A.C. Depo. at 21:12-22:15 (LF 693-94). On that occasion plaintiff talked with Fitzpatrick for 10-15 minutes, during which time she answered his questions. Id. at 23:17-24:17 (LF 694). During the following week Fitzpatrick called plaintiff three times, and they spoke for a total of about 45 minutes. Id. at 68:22-69:4 (LF 701). They never discussed sex, kissing, or having "any kind of boyfriend or girlfriend relationship," as claimed by the defendants. Id. at 68:3-16 (LF 701).

The record also shows that neither plaintiff nor Fitzpatrick ever made any plans to meet at the Mall on the night of the rape. Plaintiff testified that Fitzpatrick called her earlier that day and asked what she was doing. Id. at 69:20-70:12 (LF 701-02). She replied that she might go to the Mall with Alicia Griddine, but she did not give a time when they would be there. Id. Likewise Fitzpatrick himself specifically disclaimed any plan to meet plaintiff that night. Instead he testified that he went to the Ward Parkway Mall instead of Bannister Mall because his friend's father did not want to drive all the way to Bannister Mall. Thus, defendants' claim that plaintiff and Fitzpatrick "arranged to see one another at [the Ward Parkway Mall] on the date in question," WPSCC Brief at 41, is false.

3. Defendants Have Severely Exaggerated Plaintiff's Conduct Prior To Her Rape, And Have Just As Severely Understated The Violence Of Her Rape

IPC claims that plaintiff and Fitzpatrick were "making out" before she was raped, going so far as to put the phrase in quotation marks. IPC Brief at 12. However, the cited portion of Alicia Griddine's deposition says no such thing. In fact, Ms. Griddine gave exactly the opposite testimony:

> Q: Did you ever see [plaintiff] and Brandon making out at any time that day?
>
> A: No.

Griddine Depo. at 41:20-22 (LF 841). IPC has simply made up a quotation that does not exist.

Likewise, defendants' claim that plaintiff "consensually engaged in acts of affection with Fitzpatrick," IPC Brief at 56, is a knowing distortion of the record. Plaintiff ran into Fitzpatrick after she left the movie. L.A.C. Depo. at 34:18-24 (LF 696). After some conversation, he gave her a quick and unexpected kiss that "was done before I would even react." Id. at 45:11-23 (LF 697). He then took her purse and ran off with it into a hallway. Id. at 37:25-38:9 (LF 696). Plaintiff ran and caught him. Id. at 40:14-41:17 (LF 697). She said "[g]ive me back my purse," and he replied "[n]o, not till you give me a kiss." Id. at 41:21-42:17 (LF 697). Because she wished to get her purse back, she agreed to kiss him once and he gave her a hickey on her neck. Id. at 44:11-24 (LF 697). He gave her purse back to her and, as she turned to walk away, he grabbed her arm and said, "Let's do it." Id.

at 48:22-49:8 (LF 698). Plaintiff, not realizing what he was referring to, said, "Do what?" Id. at 49:9-13 (LF 698). He repeated, "Let's do it" while looking her up and down, and she realized that he was referring to having sex. Id. at 49:25-50:22 (LF 698). She became scared and said, "No." He responded, "No, come on." She repeated, "No." He said, "No, we're going to do this." He picked her up over his shoulder, ignoring her plea of "put me down, put me down," and pinned her legs down with his arms when she tried to kick him. Id. at 55:23-58:22 (LF 699-700). As he carried her through a doorway of the Mall, marked as an emergency exit, which led to the catwalk, she screamed and yelled, "Stop, Put me down." Id. at 60:1-61:12 (LF 700).

Once outside Fitzpatrick put plaintiff down with her back against the wall. She tried to get away, but he grabbed both of her arms and pushed her against the wall hollering, "Stay still, stay still, don't move." Id. at 63:15-65:2 (LF 700-01). She squirmed and jerked, asking him to "Stop. Leave me alone. Let me go." Id. at 65:3-7 (LF 701). He ignored her and pinned her against the wall, trying to unbuckle her jeans. When he couldn't remove her pants because of her struggling he said "Forget this," picked her up over his shoulder again, and carried her around to the other side of the wall and into a cubbyhole. Id. at 65:18-66:4 (LF 701). There he threw her down onto the floor, following her down as she landed, placed his knee in her stomach, and pinned her arms with his hands. Id. at 82:2-19 (LF 704). When he removed his hands from her arms in order to remove her pants she tried to push herself up on her elbows. He simply pushed his knee harder into her stomach, telling her repeatedly "You better stop moving." Id. at 82:23-84:1 (LF 704). She asked him "Why are you doing this?" but he did not respond. Id. at 84:2-19 (LF 704). When she tried to

scream he either placed his hand over her mouth or pushed his knee deeper into her stomach. Id. at 89:23-91:7 (LF 705). Eventually she was crying such that she could not scream anymore, and she thought that if she just lay there quietly he would stop. Id. He did not stop. While raping her Fitzpatrick was calling plaintiff a "bitch." Id. at 106:19-25 (LF 708). This is the encounter that defendants refer to as plaintiff "having sex" with her "boyfriend."

4. Plaintiff Was Severely Affected By The Rape

Defendants' claims that plaintiff was undisturbed by Fitzpatrick's attack are also contrary to the record. After the rape Fitzpatrick was very angry, yelling and swearing at plaintiff while she sat on the floor crying. Id. at 91:8-17 (LF 705). He eventually said "Come on. Get up. Let's go," pulled her up, and walked her around the corner back to the doors leading to the Mall. Id. at 92:21-93:7 (LF 705). As they walked he said, "Fix your shirt. Wipe off your arms. Wipe off your face." Id. As they reentered the Mall through the doors he said, "Don't say anything to nobody." Id. at 99:16-100:4 (LF 706-07). Plaintiff said nothing to Fitzpatrick after the rape occurred. Once in the common area she separated from him and went to find her friend Alicia. Id. at 95:16-96:2 (LF 706).

Plaintiff was crying when she went back into the Mall after the rape. Id. at 95:1-3 (LF 706). She walked through the Mall with tears streaked on her face. Id. at 96:24-97:5 (LF 706). For a brief time, still in shock, she obeyed Fitzpatrick's order not to speak to anyone. However, a minute or two later, when she was alone with Alicia, she broke down and cried that "she didn't want to" and "she said that he raped her." Griddine Depo. at 32:9-17 (LF 839). She said this "over and over." Id. Plaintiff reported the rape to her mother and then to the police that very same night. Id. at 50:11-14 (LF 842). She received medical

treatment that night at St. Joseph's Hospital, L.A.C. Depo. at 119:25-120:2 (LF 710), and she has required extensive counseling to help her deal with the rape. Id. at 123:1-124:22 (LF 710-11).

Reply To Defendants' Arguments

I. Defendants Do Not Deny That The Violent Crimes Identified By Plaintiff Occurred On Their Property, And They Cannot Distinguish This Case From Madden, Decker, Smoote, Bowman, Becker and Pickle, All Of Which Imposed A Duty To Act Reasonably In Cases Involving Far Fewer Prior Crimes

As discussed in her Main Brief, plaintiff need only make three showings to prevail under the prior violent crimes rule: (1) she was an invitee of the Ward Parkway Mall; (2) there were a sufficient number of prior crimes at that Mall so that the defendants could reasonably foresee the possibility of criminal attacks on their patrons; and (3) those prior crimes were of the type that would cause a reasonable person to take precautions. Main Brief at 51-52 (and cases cited therein). Plaintiff has satisfied these elements by showing a pattern of prior violent crime at the Ward Parkway Mall, including 37 specific violent crimes occurring at the Mall within the 25 months preceding her rape. That showing is more than sufficient to establish a duty because the Missouri courts have consistently found a duty to exist upon a showing of seven to fourteen prior crimes. Id. at 53-54 (and cases cited therein).

Defendants admit that plaintiff has satisfied the first element by showing she was an invitee on their premises. They contest the second element, however, by (among other things) trying to minimize the seriousness of the crimes committed at the Mall, and claiming that as a large mall they should not be held to the same standards that apply to small

businesses. Defendants also contest the third element by claiming that none of the prior crimes shown by plaintiff are sufficiently similar to her rape, despite the fact that all of these crimes were violent, and three even involved sexual assaults. Finally, defendants try to invent a new "fourth element" for the prior violent crimes rule, claiming that plaintiff cannot recover absent a showing that she had never met her assailant before. Each of these arguments should be rejected, for the following reasons.

A. Plaintiff Has Satisfied The Second Element Of The Prior Violent Crimes Rule By Showing A Pattern Of 37 Violent Crimes At The Ward Parkway Mall In Only A 25 Month Period

As discussed in plaintiff's Main Brief, both this Court and the Courts of Appeals have consistently held a duty to exist under the prior violent crimes rule based upon a far lower number of prior crimes than is presented in this case, usually in the range of seven to fourteen. See, e.g., Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59, 62 (Mo. banc 1988) (14 prior crimes); Decker v. Gramex Corp., 758 S.W.2d 59, 63 (Mo. banc 1988) (7 prior crimes); Smoote v. Sinclair Oil Corp., 1999 WL 1219882 at *7 (Mo. App. E.D. Dec. 21, 1999), transfer granted, (Mo. banc Apr. 25, 2000) (10 prior crimes); Bowman v. McDonald's Corp., 916 S.W.2d 270, 277-78 (Mo. App. W.D. 1995) (3 prior crimes); Becker v. Diamond Parking, Inc., 768 S.W.2d 169, 171 (Mo. App. W.D. 1989) (1 prior assault along with several break-ins); Pickle v. Denny's Restaurant, Inc., 763 S.W.2d 678, 681-82 (Mo. App. W.D. 1988) (9 prior crimes). This case, which involves 37 violent crimes in only a 25 month period, fits squarely within the holdings of Madden, Decker, Smoote, Bowman, Becker and Pickle.

Defendants offer several arguments for distinguishing this case from Madden, Decker, Smoote, Bowman, Becker and Pickle, none of which are convincing. First, defendants claim that Madden and Decker imposed a duty only upon a showing of a "pattern of crimes involving serious bodily injury." IPC Brief at 47. That is not true. In Madden, this Court held a duty was established to protect against an abduction and rape based on "six armed robberies, six strong arm robberies, one assault, and one purse snatching." Madden, 758 S.W.2d at 60. Similarly, in Decker, the Court held a duty was established to protect against an abduction and rape based on four armed robberies, an assault, an assault with a deadly weapon and flourishing a deadly weapon. Decker, 758 S.W.2d at 63.[1] Neither case mentions evidence of any serious bodily injury. The reason is simple – the prior violent crimes rule does not look to whether previous crimes actually resulted in physical harm or not. Rather, the question is whether those crimes were sufficiently serious to put the property owner on notice that they might have resulted in physical harm. Armed robbery, strong arm robbery, assault and battery are all examples of crimes that might result in physical harm, and these crimes count toward establishing a duty under the prior violent crimes rule even if the victim is fortunate enough to escape injury. Madden, 758 S.W.2d at 62 n.2; Decker, 758 S.W.2d at 63; Pickle, 763 S.W.2d at 681.

[1] IPC further states that these crimes occurred "over a short time period." IPC Brief at 46. In fact, Decker clearly states that the crimes took place over a three year period (the same period as in Madden) – several months longer than the 25 month period of the crimes listed by plaintiff in her Main Brief. Decker, 758 S.W.2d at 61.

Second, defendants try to invent a per capita rule, arguing that because their Mall "is visited by hundreds of thousands of people each year" plaintiff must show hundreds (if not thousands) of prior crimes, rather than the 7 to 14 prior crimes held to establish a duty in Madden and Decker. IPC Brief at 47; WPSCC Brief at 27-28. Defendants cite no authority to support this proposition, nor can they. They simply made it up. No court has ever suggested that small businesses should be held to a higher standard than large ones. In fact, as Judge Robertson's concurring opinion in Madden and Decker makes clear, the opposite is true – a duty is more properly placed on large businesses than small ones. The reason is that, although taking reasonable security measures involves cost to the landowner, that landowner "is in the best position to take measures to avoid the injury" and "[t]he cost of the measures can be spread over [its] entire product and customer base." Madden, 758 S.W.2d at 65.[2] The Ward Parkway Mall has a much larger customer base than the "small barbecue restaurant" at issue in Madden, and it certainly is in a better position to provide proper security.

[2] The relative size of the defendants in Madden and Decker also weighs against defendants' per capita argument. In Madden, this Court imposed a duty on a small barbecue restaurant based upon a showing of fourteen prior violent crimes. Madden, 758 S.W.2d at 62. In the same opinion, the Court imposed that same duty on a larger grocery store and department store in a shopping center based on a showing of only seven previous violent crimes. Decker, 758 S.W.2d at 63. If the duty to protect patrons depended on the relative size of a business, the Court certainly would have made that clear in Madden and Decker.

Third, defendants attempt to minimize the seriousness of the prior violent crimes at the Ward Parkway Mall. For example, IPC claims that defendants had no knowledge of a prior sexual assault that occurred at the Mall. IPC Brief at 44. But the account of the sexual assault in question is taken directly from IPC's own incident report dated April 24, 1996, showing that defendants' professed lack of knowledge is false.[3] (LF 416). Similarly, IPC tries to characterize two armed robberies as simple thefts because it was "never confirmed" that the attacker actually had a weapon. IPC Brief at 43-44. The incident reports clearly show, however, that in these cases the attacker stated he had a gun and would use it. (LF 936, 1075). Whether the robber actually had a gun or not is irrelevant to the issue of whether the crimes of robbery and assault were committed. State v. Steffenhagen, 671 S.W.2d 344, 345-46 (Mo. App. E.D. 1984) (unarmed man guilty of robbery when he threatened bank teller by telling her he had a ".38 Special"). Defendants' claim that one crime involved a victim and attacker who were "only playing" is likewise proved false. IPC Brief at 44. IPC's report for this incident, which characterizes the crime

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3 IPC's attempt to disclaim its own incident reports, IPC Brief at 51-52, is without merit. These incident reports were created by IPC, in its routine course of business, at the time that each incident took place. IPC and the Mall defendants reviewed these reports on a regular basis in managing the Mall and determining what level of security was required. Levenberg Depo. at 35:6-10 (LF 735). Indeed, IPC itself was the first party to offer the incident reports into the record, submitting 76 pages of the reports in support of its summary judgment motion. (LF 264-339).

as a "battery," shows that witnesses "stated the offender hit the victim several times in the head, put the [victim] in a head lock and drug her to the car." (LF 1087-88). Each of these crimes fits Madden's definition of violent crime, and each is relevant to show defendants' knowledge of the need to take precautions to protect their customers.

B. Plaintiff Has Satisfied The Third Element Of The Prior Violent Crimes Rule Because The Prior Crimes At The Ward Parkway Mall Were Sufficiently Violent To Place Defendants On Notice That Their Invitees Might Be Exposed To Danger

Even after all their attempts to minimize the crime problem at the Ward Parkway Mall, defendants are forced to admit that by their own count there have been at least 16 or 20 (depending on the brief) crimes that are eligible under the prior violent crimes rule. WPSCC Brief at 26; IPC Brief at 43. Thus, even though they count only half of the 37 violent crimes occurring at the Ward Parkway Mall in the 25 months preceding plaintiff's rape, defendants have each admitted to more prior crimes than the seven to fourteen found to create a duty in Madden, Decker, Smoote, Bowman, Becker and Pickle.

Having made such an important concession, defendants are forced to argue that the violent crimes at the Ward Parkway Mall are not "sufficiently similar" to plaintiff's rape in this case. WPSCC Brief at 37. That argument runs directly counter to this Court's holdings in Madden and Decker. The Court squarely held in those cases that sexual assault is foreseeable based upon prior incidents of "arson, robbery, assault, burglary and stealing." Madden, 758 S.W.2d at 62 n.2. Thus, in Madden, the Court held a duty established to protect against an abduction and rape based on "six armed robberies, six strong arm

robberies, one assault, and one purse snatching," Madden, 758 S.W.2d at 60. Likewise, in Decker, the Court held a duty established to protect against an abduction and rape based on four armed robberies, an assault, an assault with a deadly weapon and flourishing a deadly weapon. Decker, 758 S.W.2d at 63. The key is whether the prior crimes were sufficiently violent to put defendants on notice that their "invitees may be exposed to danger." Id. at 62. The crimes cited by plaintiff in this case all fit the definition provided by Madden and Decker, and plaintiff need not present evidence of a prior rape identical in every way to her own in order to prevail.

With this argument refuted, defendants are left to rely on two cases from the Eastern District – Wood v. Centermark Properties, Inc., 984 S.W.2d 517 (Mo. App. E.D. 1998) and Hudson v. Riverport Performance Arts Centre, 37 S.W.3d 261 (Mo. App. E.D. 2000). Neither case is factually similar to the situation here. Although defendants claim "this case is, for all relevant purposes, identical to Wood," IPC Brief at 42, the cases in fact could not be more different.

Of the 20 crimes considered by the Wood court, five were merely nonviolent purse snatchings. Wood, 984 S.W.2d at 524. Nonviolent purse snatchings do not count toward establishing a duty, Brown v. National Super Markets, Inc., 731 S.W.2d 291, 294 (Mo. App. E.D. 1987), and plaintiff in this case is not relying on any such purse snatchings. See Main Brief at 55-59 (listing prior violent crimes, none of which were purse snatchings). Moreover, as the Wood court stressed, in that case only one crime "involve[d] the potential use of a weapon." Wood, 984 S.W.2d at 525. The record in this case is replete with

incidents involving the use of a deadly weapon.[4] In addition, nine of the 20 crimes involved in Wood were minor assaults, which the court characterized as involving "mall patrons who exchanged blows with one another after some previous altercation." Wood, 984 S.W.2d at 525. In this case, by contrast, plaintiff has shown the existence of serious assaults at the Ward Parkway Mall, committed during the course of robberies, which led to physical injuries suffered by the victims.[5]

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[4] See, e.g., LF 923-24 (robbery with knife); LF 925-26 (robbery with gun); LF 929-30 (robbery with gun); LF 995-96 (assault with knife); LF 932-33 (robbery with gun); LF 997-98 (threatened use of gun); LF 934 (robbery with gun); LF 935-36 (robbery with gun); LF 1074-75 (robbery with gun); LF 937-38 (robbery with gun); LF 1161-64 (robbery with gun); LF 966-69 (robbery with gun); LF 940-41 (robbery with gun); LF 916-22 (kidnaping with knife); LF 970-72 (robbery with gun); LF 944-45 (robbery with gun); LF 949-50 (robbery with gun); LF 951-55 (armed robbery and spraying with mace); LF 956-57 (robbery with knife).

[5] See, e.g., LF 1027-29 (female robbery victim assaulted and "transported to Research Hospital"); LF 973-74 (elderly robbery victim required stitches to head after being knocked to the ground); LF 956-57 (victim assaulted with knife, sustaining injuries to chest and hands); LF 982-83 (female robbery victim suffered "a hurt right shoulder, a broken ring finger on her left hand and a bruised jaw bone on the left side of her face," for which she received medical treatment at St. Joseph's Hospital).

The facts of the Hudson case are even more removed from the facts here. In Hudson, an attacker struck the victim with a bottle, causing minor injuries. Hudson, 37 S.W.3d at 263. The victim subsequently filed suit, arguing that the owners of the amphitheater were on notice of the need to take precautions against violent crimes against their patrons. However, the victim could point to no previous violent crimes on the premises, only minor assaults: "[o]ut of these assaults, most appeared to be fistfights, elbowing, pushing, kicking, and pulling hair; none of these assaults involved a bottle or other similar object." Id. at 265. Every one of the 37 violent crimes identified by plaintiff is more serious than any crime at issue in Hudson.

C. There Is No Fourth Element To The Prior Violent Crimes Rule

Defendants spend an inordinate amount of time in their briefs harping on the fact that plaintiff had met her attacker once before he raped her. The WPSCC defendants in particular go so far as to claim a new fourth element of the prior violent crimes rule – that "the assailant must be unknown" to the plaintiff. WPSCC Brief at 41-42. The WPSCC defendants cite no authority for that position, nor can they. Every Missouri case to articulate the elements of the prior violent crimes rule has listed the three elements discussed by plaintiff in her Main Brief, and no case has ever refused to find a duty based on the fact that the victim had previously met her attacker. See, e.g., Madden, 758 S.W.2d at 62; Groce v. Kansas City Spirit, Inc., 925 S.W.2d 880, 885 (Mo. App. W.D. 1996); Bowman, 916 S.W.2d at 277-78; Becker, 768 S.W.2d at 171; Pickle, 763 S.W.2d at 681-82. As the Court of Appeals correctly held, "the 'unknown' reference in the [prior violent crimes] exception

relates to the business owner, not the plaintiff." L.A.C. v. Ward Parkway Shopping Center Co., L.P., 2001 WL 376347 at *7 n.5 (Mo. App. W.D. April 17, 2001).

II. IPC Owed A Duty To Plaintiff Because It Agreed To Perform Security Services At The Mall And It Knew That If These Duties Were Left Undone Harm Would Likely Result To Mall Patrons

As discussed in plaintiff's Main Brief, this Court has held that tort liability may be predicated on the breach of a duty assumed by a contract, and that a person can assume by contract a duty to a person who is not a party to that contract. Plaintiff's Main Brief at 81-82. Indeed, the Missouri courts have specifically held that a security company may, by contract, assume a duty to store patrons by contracting to provide security services at a commercial establishment open to the public. Brown v. National Supermarkets, Inc., 679 S.W.2d 307, 309-10 (Mo. App. E.D. 1984). "The existence of a duty will turn on the terms of the contract and the circumstances." Id. at 309.

Here IPC admits that it contracted with the other defendants to provide security at the Ward Parkway Mall. IPC Brief at 9. It does not deny that, among other things, it agreed to determine "the proper level of staffing needed to provide adequate security," and to provide security services "in accordance with accepted security practices and standards." Security Agreement at VI.5 (LF 1666); id. at I.6 (LF 1661). IPC further does not deny that it left a key observation post directly above the scene of plaintiff's rape unmanned due to its lack of sufficient security staff. Coudriet Depo. at 27:3-8 (LF 772). This was a frequent problem at the Mall. Id. at 28:16-25 (LF 772). IPC knew that it had agreed to perform security duties at the Mall, and it knew that if these duties were left

undone harm would likely result to Mall patrons. There is accordingly "'no good reason why [IPC] should not be held liable to third persons [such as plaintiff] for [its] failure to do that which [it] agreed to do, which [it] assumed responsibility for, and which was reasonably necessary to be done for their protection.'" Westerhold v. Carroll, 419 S.W.2d 73, 80 (Mo. 1967) (quoting Lambert v. Jones, 98 S.W.2d 752, 758 (Mo. 1936)).

IPC makes no effort to address the six factors identified by this Court for determining whether a defendant has assumed by contract a duty of care to third persons. Instead, IPC argues that it cannot be held liable because it never made personal assurances to plaintiff. IPC Brief at 26-27. That argument is a complete red herring – plaintiff has never claimed that anyone made personal assurances to her, and she has asserted no claim under such a theory. The primary case cited by IPC, Keenan v. Miriam Found., 784 S.W.2d 298 (Mo. App. E.D. 1990), deals with the duties that a landowner owes to the public at large, not to any additional duties that a security company voluntarily assumes by contract. Id. at 299-300. IPC's reliance on M.C. v. Yeargin, 11 S.W.3d 604 (Mo. App. E.D. 1999), suffers from the same defect. The Yeargin case also dealt with the duties of a landowner (in particular, an innkeeper), not a company voluntarily assuming additional duties by contract. Moreover, contrary to IPC's claim, the Yeargin court specifically held that the defendant innkeeper "was required to take immediate action" once its guards learned "there was some sort of activity from which Plaintiff needed Marriott's assistance . . . ." Id. at 613. Thus, even if the reasoning of Yeargin were applied to this case, IPC would be held liable because plaintiff's friend told two different IPC security guards that she was in trouble, but they did nothing to help. Griddine Test. at 39-41 (LF 1546-48).

IPC next attempts to distinguish this case from Holshouser v. Shaner Hotel Group Properties One Ltd. Partnership, 518 S.E.2d 17 (N.C. Ct. App. 1999), and Professional Sports, Inc. v. Gillette Security, Inc., 766 P.2d 91 (Ariz. Ct. App. 1988). With regard to Holshouser, IPC makes no attempt to refute the law set forth in that case or to distinguish the security contract in that case from the one at issue here. Rather, IPC simply states that the Holshouser court "only" held "that the plaintiff in that case had provided sufficient factual evidence to withstand a motion for summary judgment . . . ." IPC Brief at 29-30. That is exactly plaintiff's point. For the same reasons stated by the Holshouser court, plaintiff in this case has also produced sufficient evidence to defeat summary judgment, and the case should be remanded for trial on the merits.

With respect to Gillette, IPC claims that the case has no relevance because it "is not even a third-party case, but rather a direct action between the two contracting parties." IPC Brief at 30. In fact, the direct issue in Gillette was whether the security company owed a duty to a young patron who was injured after the company allowed him to consume too much alcohol. The young man filed an action against the ballpark, which in turn filed a third-party complaint against the security company for contribution. Gillette, 766 P.2d at 92. The security company then moved for summary judgment, arguing that it could not be a joint tortfeasor for the purpose of contribution because it owed no duty to the injured young man. Id. The Gillette court rejected that argument, holding that the security company had, by virtue of its contract to provide security services, assumed a duty to the patrons of the ballpark. Id. at 95. Thus, the Gillette decision is directly on point and supports plaintiff's

argument that IPC assumed a duty to mall patrons, including her, by virtue of its contract to provide security at the Ward Parkway Mall.

Next, IPC claims that plaintiff cannot recover because "[i]t has long been the rule in Missouri that a breach of contract does not give rise to tort liability." IPC Brief at 35. In fact "Missouri law recognizes that a tort may be committed in the nonobservance of contract duties and that a negligent failure to perform a contractual undertaking may result in tort liability." Preferred Physicians Mut. Management v. Preferred Physicians Mut. Risk Retention, 918 S.W.2d 805, 813 (Mo. App. W.D. 1996); accord Brown v. National Supermarkets, Inc., 679 S.W.2d 307, 310 (Mo. App. E.D. 1984); Howell v. Welders Prods. & Servs., Inc., 627 S.W.2d 311, 313 (Mo. App. W.D. 1981). "'An obligation may, likewise, be assumed by contract, out of which may arise a duty to others than the party to the contract.'" Howell, 627 S.W.2d at 313 (quoting Lowery v. Kansas City, 85 S.W.2d 104, 110 (Mo. 1935)); Westerhold v. Carroll, 419 S.W.2d 73, 81 (Mo. 1967). The Missouri courts have even expressly held that a security company may, by contract, assume a duty to store patrons by contracting to provide security services at a commercial establishment open to the public. Brown v. National Supermarkets, Inc., 679 S.W.2d 307, 309-10 (Mo. App. E.D. 1984). IPC never once mentions the Brown case in its brief, and obviously has no way to distinguish it from the present case.

IPC bases its argument that tort liability cannot arise from a mere breach of contract on two cases – Preferred Physicians Mut. Management, discussed above, and Khulusi v. Southwestern Bell Yellow Pages, Inc., 916 S.W.2d 227 (Mo. App. W.D. 1995). IPC Brief at 32, 35. However, IPC neglects to mention one crucial fact: unlike the present

case, both of those cases involved tort claims asserted by a party to the underlying contract. Preferred Physicians Mut. Management, 918 S.W.2d at 808; Khulusi, 916 S.W.2d at 229. As the Missouri courts have stressed, most cases "on the subject of tort liability arising out of nonobservance of contract duties . . . involve third parties asserting claims against one of the parties to the contract." Preferred Physicians Mut. Management, 918 S.W.2d at 814. A party to a contract can bargain to protect her own interests – someone who is not a party to the contract (such as plaintiff here) cannot. Laclede Inv. Corp. v. Kaiser, 596 S.W.2d 36, 44 (Mo. App. E.D. 1980).

Finally, IPC argues that this Court's Westerhold case (one of the many supporting cases cited by plaintiff in her Main Brief) is simply a surety case "expressly limited to its facts." IPC Brief at 35. Although the Court in Westerhold stated that questions of duty are resolved on a case-to-case basis, it never suggested that its ruling should be limited to the surety context, as IPC suggests. In fact, the Court offered six factors to consider in determining whether liability should attach – all of which favor plaintiff in this case, and all of which are completely ignored by IPC. Westerhold, 419 S.W.2d at 81. This Court recently applied Westerhold and its six factor test to allow third parties to recover against attorneys who negligently perform their contractual duties. Donahue v. Shughart, Thomson & Kilroy, P.C., 900 S.W.2d 624, 627 (Mo. banc 1995). And courts in other jurisdictions have applied the same six factor test in allowing third parties to recover against security companies, as well as architects, construction companies, engineers, funeral home operators and notaries. Main Brief at 83 (and cases cited therein). IPC's attempt to limit

Westerhold is clearly wrong and is obviously motivated by IPC's knowledge that it cannot prevail if the Westerhold analysis is applied to the facts in this case.

III. IPC Was Hired For The Specific Purpose Of Discharging The Mall's Actual Or Supposed Duty To Provide Reasonable Security, And Plaintiff Is Accordingly Within The Class Of Persons For Whose Benefit IPC's Contract Was Made

As discussed in plaintiff's Main Brief, Missouri law allows a third party to bring a breach of contract claim if they are an intended beneficiary to that contract. Main Brief at 96-97 (and cases cited therein). The test is whether the promise in the contract was made to "'satisfy an actual, supposed, or asserted duty of the promisee to the beneficiary.'" Terre du Lac Ass'n v. Terre du Lac, Inc., 737 S.W.2d 206, 213 (Mo. App. E.D. 1987) (quoting Restatement of Contracts Section 133(1)(a)). Parties wishing to disclaim liability to third parties routinely use boilerplate language to that effect, just as defendant General Growth did in this case. (LF 1804). Such routine boilerplate language is conspicuously missing from IPC's contract, and with good reason. Plaintiff has produced direct testimony from the WPSCC defendants that they hired IPC to provide security services because they thought, rightly or wrongly, that they had a duty to do so. Levenberg Depo. at 42:5-22 (LF 737); Daise Depo. at 40:25-41:16 (LF 1523-24). Thus, plaintiff is a third party beneficiary to IPC's security contract because it was made for the purpose of discharging the "actual, supposed or asserted duty" of the WPSCC defendants to her and other Mall patrons.

IPC has not responded to this argument at all. The primary case relied upon by IPC emphasizes that "[t]he question of intent is paramount in any analysis of an alleged

third party beneficiary situation." Wood v. Centermark Properties, Inc., 984 S.W.2d 517, 526 (Mo. App. E.D. 1998). Yet nowhere in its brief does IPC discuss the evidence surrounding the parties' intent in making the security contract at issue. IPC does not discuss this evidence because the evidence is unequivocal. The parties themselves have spoken as to their intentions in making the security contract at issue, and their unambiguous intent was to benefit Mall patrons such as plaintiff.

Rather than address the evidence in the record, IPC instead argues that plaintiff cannot prevail absent a showing "that the security contract was entered into *for her benefit*." IPC Brief at 21 (emphasis in original). That is not a correct statement of the law. The Missouri courts have repeatedly held that a plaintiff may bring a cause of action as a third party beneficiary if the parties to the underlying contract intended "either to benefit [her] or an identifiable class of which [she] is a member." Volume Servs., Inc. v. C.F. Murphy & Assocs., 656 S.W.2d 785, 794-95 (Mo. App. W.D. 1983) (emphasis supplied); accord Terre du Lac Ass'n, 737 S.W.2d at 213; Laclede Inv. Corp. v. Kaiser, 596 S.W.2d 36, 42 (Mo. App. E.D. 1980). The question in this case is not whether the WPSCC defendants intended to benefit plaintiff personally when they hired IPC, but whether they intended to provide protection to Mall patrons in general. As plaintiff asked in her Main Brief, if IPC was not hired to protect Mall patrons, then for whose benefit were its security services to be provided? IPC cannot prevail unless and until it provides a satisfactory answer to that question.

Next, IPC claims that its contract is unambiguous and "[n]owhere in the contract does it provide that WPSC customers are a class of persons protected by IPC." Id.

at 22. That claim is false. The contract specifically requires IPC "to provide security services" at the Mall, Security Agreement at I.1 (LF 1657), and even more explicitly requires IPC to protect "mall customers . . . from risk of serious injury" by making arrests as necessary. Id. at I.3.H (LF 1658). The contract still further spells out in detail the duties and responsibilities of IPC, all of which are clearly intended to provide protection to Mall patrons. Id. at I.3.A-K, I.6, VI.5 (LF 1657-59, 1661, 1666). If IPC is correct in claiming that the contract is unambiguous, then plaintiff prevails because she is a "mall customer" whom IPC was required to protect "from risk of serious injury." If, on the other hand, IPC wants to argue that the contract provisions cited by plaintiff do not mean what they appear to mean in plain English, then the evidence taken from its own documents may be used to defeat that claim. IPC loses either way.

IPC's internal documents are also relevant to determining the parties' intent because they are incorporated into the security contract by reference. President Riverboat Casino-Missouri, Inc. v. Missouri Gaming Comm'n, 13 S.W.3d 635, 641 (Mo. banc 2000) ("[i]ncorporation by reference may be by a 'specific and descriptive reference' to the source adopted," thus incorporating that source into the agreement). The Policies and Procedures Manual "includes Manager's instructions to CONTRACTOR [IPC]," and IPC's personnel "shall be familiar with and will adhere to those instructions and regulations at all times." Security Agreement at I.3.J (LF 1659). Similarly, IPC's Training Guide comes from a required training program that, under the terms of the contract, must be given to all IPC personnel. Id. at IV.1-3 (LF 1664). IPC's argument that the Policy and Procedure Manual "is not a contract" is beside the point. IPC Brief at 23. The language cited by IPC is directed

solely at its own employees, and is simply designed to maintain their at-will employment status. (LF 1583). Plaintiff is not claiming that the Policy and Procedure Manual is itself a contract, but merely that the document shows the parties' intent in hiring IPC to provide security services at the Mall. The Manual is clearly relevant for that purpose.

IPC further claims, without authority, that even after showing she is a third party beneficiary plaintiff must further show that she has "standing" to enforce the contract. IPC Brief at 24. IPC's argument confuses the purpose of the classification of beneficiaries established by the Restatement of Contracts Section 133, as adopted by the Missouri courts. Section 133 does not create a two-step process, as suggested by IPC. Rather, Section 133 defines which beneficiaries are third party beneficiaries who may recover (i.e., creditor and donee beneficiaries), and which beneficiaries are mere incidental beneficiaries who may not recover (i.e., incidental beneficiaries). Terre du Lac Ass'n, 737 S.W.2d at 213; Laclede Inv. Corp., 596 S.W.2d at 42 n.5; State ex rel. McHarevo Dev. Corp. v. Lasky, 569 S.W.2d 273, 275 (Mo. App. 1978). As discussed in her Main Brief, plaintiff is a creditor beneficiary in this case because General Growth hired IPC for the purpose of discharging its "actual, supposed or asserted duty" of providing protection to her and other Mall patrons. Main Brief at 98-103. No further showing is required for her to recover.

Finally, IPC cites the Wood case for the proposition that, as a matter of law, all mall patrons "are at best incidental beneficiaries to a contract between a security company and a mall's owner or manager." IPC Brief at 24. No such general statement can be made. The Missouri courts have specifically held that shoppers and business invitees may be third party beneficiaries to a landowner's contract with a security company. Miller v. SSI Global

Sec. Serv., 892 S.W.2d 732, 734 (Mo. App. E.D. 1994); Brown v. National Supermarkets, Inc., 679 S.W.2d 307, 309-10 (Mo. App. E.D. 1984). As the Wood court itself acknowledged, "[t]he question of intent is paramount . . . ." Wood, 984 S.W.2d at 526. Intent must necessarily be decided on a case by case basis after reviewing the evidence. The Wood case did not involve a security company at all, and the plaintiff in that case produced no evidence regarding the parties' reasons for requiring that a tenant pay a "community area charge." Id. at 527. Plaintiff in this case, by contrast, has produced abundant evidence of the parties' intent, and has specifically showed that the WPSCC defendants contracted with IPC to discharge their "actual, supposed or asserted duty" to plaintiff and other Mall patrons. The Wood case is therefore inapplicable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(c) and (g), the undersigned hereby certifies the following:

1. This brief complies with the limitations contained in Rule 84.06(b);

2. This brief was prepared using Microsoft Word 2000. According to the word count feature used in that program, this brief contains 7,695 words.

3. A copy of this brief is being submitted on a 3 1/2–inch floppy disk. This disk has been scanned for viruses using the program Norton AntiVirus 2000. The disk is virus-free.

_____
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